LIBRARY
SUPREME COURT, U. S.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

Supreme Court, U.S.
FILED
OCT 26 1971
E. ROBERT SEAVER, CLERK

No. 71-420

WEST MORRIS REGIONAL BOARD OF EDUCATION
a municipal corporation of the State of New Jersey,

Petitioners,

vs.

ARTHUR J. SILLS, Attorney General of the State of New Jersey, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

BRIEF IN OPPOSITION

GEORGE F. KUGLER, JR.,
Attorney General of New Jersey,
Attorney for Respondents,
State House Annex,
Trenton, New Jersey 08625

STEPHEN SKILLMAN,
Assistant Attorney General,
Of Counsel.

VIRGINIA LONG ANNICH,
Deputy Attorney General,
On the Brief.

TABLE OF CONTENTS

	PAGE
COUNTER-STATEMENT OF QUESTIONS PRESENTED	1
COUNTER-STATEMENT OF THE CASE	2
ARGUMENT:	
Point I—N.J.S.A. 18A:39-1 which provides for the transportation of children to nonpublic schools is consistent with the Establishment Clause of the First Amendment	3
Point II—N.J.S.A. 18A:39-1 does not violate the Equal Protection Clause of the Fourteenth Amendment by requiring that nonpublic school children be transported only in districts which must transport public school children since the result of that scheme is that all children similarly situated within a district are treated equally	8
CONCLUSION	11

Cases Cited

Americans United for Separation of Church and State v. Independent School District No. 622, —— U. S. ——, 91 S. Ct. 2275, 29 L. Ed. 2d 854 (1971)	8
Board of Education of Central School Dist. No. I v. Allen, 392 U. S. 236 (1968)	5-7
Dandridge v. Williams, 397 U. S. 471 (1970)	11
Everson v. Board of Education of Ewing Township, 330 U. S. 1	3-8

PAGE

Lemon v. Kurtzman, 403 U. S. ——, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971) 7

Tilton v. Richardson, 403 U. S. ——, 91 S. Ct. 2091, 29 L. Ed. 2d 790 (1971) 7, 8

Walz v. Tax Commission, 397 U. S. 644 (1970) 6, 7

West Morris Reg. Bd. of Ed., et al. v. Sills, et al., 58 N. J. 464, 476 (1971) 10, 11

Williamson v. Lee Optical of Oklahoma, 348 U. S. 483 (1955) 10

United States Constitution Cited

First Amendment 1-3, 7, 8

Fourteenth Amendment 2, 8

Statutes Cited

L. 1894, c. 335, §22 3

L. 1902, c. 36, §111 3

L.L. 1903, Special Session, c. 1, §117 3

L. 1941, c. 191, §1 3

L. 1967, c. 64 9

L. 1967, c. 73 4

N.J.S.A. 18A:39-1 ..... 2-4, 6-8

R.S. 18:14-8 ..... 3, 4, 9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 420

WEST MORRIS REGIONAL BOARD OF EDUCATION
a municipal corporation of the State of New Jersey,

Petitioners,

vs.

ARTHUR J. SILLS, Attorney General of the State of New Jersey, *et al.,*

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

Counter-Statement of Questions Presented

1. Does a statute, having the valid aim of providing a general program to help parents get their children, regardless of religion, safely and expeditiously to and from accredited schools, violate the First Amendment to the United States Constitution?

2. Does a statute which provides transportation only to private school students who reside in districts which must furnish transportation to public schools violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution?

Counter-Statement of the Case

Petitioners have challenged the provisions of N.J.S.A. 18A:39-1, which require that school districts which transport public school students also must transport children residing in those districts to nonpublic, nonprofit schools up to twenty miles distant from their place of residence. It is urged that the expenditure of public funds for this purpose constitutes a violation of the Establishment Clause of the First Amendment and that the classifications embodied in the statute violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

On June 25, 1971, the New Jersey Supreme Court declared that N.J.S.A. 18A:39-1 is neither violative of the First Amendment nor the Fourteenth Amendment to the United States Constitution, nor in conflict with any provision of the New Jersey Constitution. On September 23, 1971, petitioners filed a petition with this Court for a writ of certiorari.

ARGUMENT

POINT I

N.J.S.A. 18A:39-1 which provides for the transportation of children to nonpublic schools is consistent with the Establishment Clause of the First Amendment.

The first pupil transportation law in New Jersey was enacted in 1894 and gave boards of education discretion to provide transportation for children living remote from the public schoolhouse, and to levy a special tax for such purpose (L. 1894, c. 335, §22). This statute was carried over in the school law revisions of 1902 and 1903 and remained basically the same until 1941. L. 1902, c. 36, §111; L. 1903, Special Session, c. 1, §117. Up to this point, the statute was concerned solely with transportation to the public school.

The statutory scheme was changed by a 1941 amendment which expanded the coverage of the law to include not only transportation for public school children but "the transportation of school children to and from schools other than a public school, except such school as is operated for profit in whole or in part". L. 1941, c. 191, §1. The provision for the transportation of nonpublic school children was limited to *established school bus routes* (R.S. 18:14-8).

In 1947, this Court decided *Everson* v. *Board of Education of Ewing Township,* 330 U. S. 1, which held that R.S. 18:14-8 was not violative of the Establishment Clause of the First Amendment to the United States Constitution. In characterizing the progenitor of the statute at issue here as having the valid secular legislative aim

of providing "a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools" (330 U. S. at 18), this Court first articulated the primary purpose test, i.e., that in order to withstand the strictures of the Establishment Clause an enactment must have a secular legislative purpose and a primary effect that neither advances nor inhibits religion. Applying this test to R.S. 18:14-8, the Court found it to be a valid exercise of the legislative function in Establishment Clause terms:

> "Measured by these standards, we cannot say that the First Amendment prohibits New Jersey from spending tax raised funds to pay the bus fares of parochial school pupils as part of a general program under which it pays the fares of pupils attending public and other schools." 330 U. S. at 17.

Twenty years later, chapter 73 of the Laws of 1967 was enacted, which removed the requirement of "established school routes" from the New Jersey transportation law. It is this act which the petitioner seeks to have the Court review.

The prior decisions of this Court leave no doubt that the differences between the statute upheld in *Everson* and N.J.S.A. 18A:39-1 are lacking in constitutional significance. But petitioners approach the *Everson* decision in terms of a statement in the Court's opinion that the statute upheld in that case "approached the verge" of the State's constitutional power. 330 U. S. at 16. They imply from this language that if the present act goes even a degree further than its progenitor, it will fall outside of the scope of the *Everson* rationale. Specifically, they attack the elimination of the "established school routes" requirement as an indication that the Legislature intended

religious school students to be granted greater benefits than those available to public schoolers. An analysis of each law shows, however, that both were designed to provide nonpublic school children within a district with the same safe transportation that is made available to public schoolers—no more and no less. The only difference is that the new law extends this benefit to all children living within a district which buses public school children, subject to a few limited exceptions, rather than allowing the availability of the benefit to turn or whether a private school student happens to live along an established school bus route.

But, even if the present law could be considered more expansive than the act upheld in *Everson,* it still would come within the rationale of that case. In this regard, this court has repeatedly indicated that nonpublic school busing is a generally permissible activity and that its validity does not turn on rigorous conformity in every detail with the specific of the *Everson* program. In upholding New York's textbook loan law in *Board of Education of Central School Dist. No. I* v. *Allen,* 392 U. S. 236 (1968) the Court tested the validity of the New York program against what it apparently considered the clearly valid concept of providing assistance to parents of private school children for busing.

> "Of course books are different from buses. Most bus rides have no inherent religious significance, while religious books are common." 392 U. S. at 244.

The concurring and dissenting opinion expressed a similar theme:

> "In this sense it is not difficult to distinguish books which are the heart of any school from bus fares

> which provide a convenient and helpful public transportation service. With respect to the former, state financial support actively and directly assists the teaching and propagation of sectarian religious viewpoints in clear conflict with the First Amendment's establishment bar; with respect to the latter, the State merely provides a general and nondiscriminatory transportation service in no way related to substantive religious views and beliefs." 392 U. S. at 253. (Concurring opinion, Justice Black).
>
> "Whatever may be said of Everson, there is nothing ideological about a bus." 392 U. S. at 257 (Dissenting opinion, Justice Douglas).

In *Walz* v. *Tax Commission,* 397 U. S. 644 (1970), the Chief Justice assayed that in *Everson* the Court "had no difficulty in upholding reimbursement of bus fares of parochial school students". 397 U. S. at 670. Nothing in *Everson, Allen* or *Walz* even suggests that the validity of assistance for transportation of private school children turns upon whether the transportation is along "established school routes". Yet this is the only conceivable distinction between the present case and *Everson.*

Petitioners further urge that since the majority of students who obtain transportation benefits under N.J.S.A. 18A:39-1 attend religiously affiliated schools, that act unconstitutionally advances religion and falls outside the scope of *Everson.* But, it is clear that the Establishment Clause is not contravened by an enactment merely because religion or religiously affiliated institutions happen to derive some incidental benefit or suffer detriment from it. Thus, in *Everson,* this Court upheld a nonpublic school bus transportation program which involved busing only

to parochial schools even though it recognized that "children are helped to get to church schools" and that "some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets". 330 U. S. at 17. Similarly, in *Board of Education* v. *Allen, supra,* this Court acknowledged that "[p]erhaps free books make it more likely that some children will choose to attend a sectarian school". 392 U. S. at 244. But, as this Court observed in *Allen,* such an effect "does not alone demonstrate an unconstitutional degree of support for a religious institution". 392 U. S. at 244. And, it will not render the act in question invalid so long as the program generates the required neutral primary effect. Here, the primary purpose of N.J.S.A. 18A:39-1 is the valid secular aim of helping children get to school safely, without regard to the nature of the school attended. This being so, whatever benefit accrues to a religiously affiliated school is incidental to that legitimate secular goal. As such, it can have no effect on the validity of the act in terms of the First Amendment.

Petitioners have also suggested that the recent decision of this Court in *Lemon* v. *Kurtzman,* 403 U. S. ——, 91 S. Ct. 2105, 29 L. Ed. 2d 745 (1971) has raised questions as to the continuing viability of *Everson.* But nothing in *Lemon* or in *Tilton* v. *Richardson,* 403 U. S. ——, 91 S. Ct. 2091, 29 L. Ed. 2d 790 (1971) has undercut either the *Walz* view of *Everson,* or that decision itself. In fact, the opinions in *Lemon* and *Tilton* specifically cite *Everson,* thereby tacitly reaffirming its validity. Furthermore, on the same day *Lemon* and *Tilton* were decided, the Court dismissed for lack of a substantial federal question a challenge to a Minnesota school busing statute which was remarkably similar to the New Jersey law.

Americans United for Separation of Church and State v. *Independent School District No. 622*, —— U. S. ——, 91 S. Ct. 2275, 29 L. Ed. 2d 854 (1971). Finally, it is clear that petitioners' interpretation of the "political divisiveness" reference in *Lemon* is inaccurate. To accept such a literal and expansive view of the Chief Justice's point in that case would necessarily invalidate all aid to persons attending nonpublic schools (including text book loan, and building aid) on the basis of its potential for political controversy. Such a result is obviously not the fair import of that case or the Court's decision in *Tilton* v. *Richardson, supra,* upholding the constitutionality of building construction aid to church related colleges, which decision clearly demonstrates that "political divisiveness" is only one factor to be considered in determining the validity of an enactment in First Amendment terms. Thus, it must be concluded that no recent expression of this Court in any way points to a limitation of *Everson* or even a desire to analyze it anew. Accordingly, that decision should be considered dispositive of the validity of N.J.S.A. 18A:39-1 within the meaning of the Establishment Clause of the First Amendment.

POINT II

N.J.S.A. 18A:39-1 does not violate the Equal Protection Clause of the Fourteenth Amendment by requiring that nonpublic school children be transported only in districts which must transport public school children since the result of that scheme is that all children similarly situated within a district are treated equally.

The thrust of N.J.S.A. 18A:39-1 is basically this: where in a school district there are public school children who live remote from school (2.5 miles or more from grades

9-12; 2 miles or more from grades K-8) they must be transported by the board of education; and in districts in which such mandatory public school transportation is afforded, transportation *must* be supplied to remote nonpublic school students. Thus, the private school student will or will not receive transportation depending on the district of his residence.

This "triggering" device evolved out of the old law which required transportation of nonpublic school students only "along established school routes" (R.S. 18:14-8). The philosophy behind the two statutes is the same: to give to nonpublic school students what is given to public school students who reside in the same district, no more and no less. Under the old law nonpublic school children were only bused along routes that were already being used to bus to public schools. With the "triggering" device introduced by chapter 64 of the Laws of 1967, nonpublic schoolers only receive transportation if public schoolers in a district do. Thus, the new law is in this respect an extension of the old. The "trigger", like the "established school routes" requirement, is basically an equal protection formula designed to require local boards of education to treat similarly situated persons equally: to wit, all children within the district remote from their schools regardless of whether those schools are public or not.

Petitioners contend that if child benefit through safe transportation to and from school is the aim of the enactment, there is no rational basis for conferring the benefit on some private school students and not on others. At the outset, as was noted by the New Jersey Supreme Court, if all private school students must be treated as a single class without regard to residence:

> "It is remarkable that it escaped counsel and the Court in *Everson.* The statute, then as now, lim-

> ited the benefit to private school students who lived in districts which furnished transportation to public school students, and indeed the statute there differentiated between private school students even within a single district, extending its benefits only to those who used the public school route." *West Morris Reg. Bd. of Ed., et al.* v. *Sills, et al.*, 58 N. J. 464, 476 (1971).

Although petitioners frame it this way, the question is not whether the Legislature could have gone further and ordered transportation for all remote private school students. For the Legislature may choose from among rational objectives and is not prohibited from utilizing a classification so long as a reasonable theory may be conceived of to support it. *Williamson* v. *Lee Optical of Oklahoma,* 348 U. S. 483 (1955).

Here, the logical extension of petitioners' argument would have grave ramifications. On the simplest level, to require a school district which did no transporting of public school children to transport nonpublic school children would require the taxpayers in the local school district to raise 25% of the transportation costs, to be used solely for the advantage of nonpublic school students, to the complete exclusion of the public school students (75% State funds are matched by local initiative). Additionally, the local district would be required to institute and fund administratively through tax revenues a program to provide the transportation to the private school children. This would constitute a considerable administrative burden, including, among other things, management of driver personnel, formulation of school bus routes, fiscal control, the acceptance of bids, and the letting of contracts, all for the exclusive benefit of private school children. In this

respect, the New Jersey Supreme Court noted that petitioners' thesis that the Legislature may take no step unless it goes the whole distance which constitutionally could be travelled, is not viable:

> ". . . when the subject involves the expenditure of public moneys. The competing demands are such that modest objectives must be allowed even though more pervasive ones would be welcome. So long as the limited objective is not invidious in design or effect, a statute may not be invalidated merely because it would also be reasonable to do more." 58 N. J. at 481.

Thus, the Legislature extended transportation to the private school student on the same basis as it would have been available if he attended public school in his district. There is nothing arbitrary or irrational in this concept. *Dandridge* v. *Williams,* 397 U. S. 471 (1970).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

Respectfully submitted,

George F. Kugler, Jr.,
Attorney General of New Jersey,
Attorney for Respondents.

Stephen Skillman,
Assistant Attorney General,
Of Counsel.

Virginia Long Annich,
Deputy Attorney General,
On the Brief.